whether repentance and consequent abstinence from future misdeeds of the like nature, followed by satisfaction more or less adequate for the past, are temporal advantages quite as extensive as the good effects to be derived from the disclosure as an aid to the administration of justice, are views which I shall not enlarge upon. But assuming penance and confession to be a sacrament in the Catholic church, and a tenet of faith essential to the maintenance of that religion, I have considered it in its legal and constitutional bearings. And in every aspect in which I have been able to view it; looking at it as analogous to the rule which exempts attorneys from disclosing the professional communications of their clients entrusted to their confidence; to the fact, that in England during centuries while the Catholic religion prevailed there no case can be found in which the disclosure was coerced; that it is the law of Scotland, as it is the law in several States of this Union, by express statutes to exempt the priest from disclosing information obtained in the confessional; that no principle of public policy will be invaded; and above all, that the great constitutional boon of religious toleration, which secures to all the "free exercise of religion according to the dictates of conscience," cannot be enjoyed by this class of our people if the secrets of the confessional are to be disclosed, I shall hold the priest exempt from testifying as to what was confessed to him by the deceased in the administration of the sacrament of penance.

Court of Chancery, Mobile, Ala., Oct. 1855.

THE MARINE DOCK AND MUTUAL INS. CO. *vs.* JOHN H. GOODMAN, JAMES A. MOORING, DUKE W. GOODMAN, THE FULTON INS. CO., THE FRANKLIN INS. CO.

1. An insurer is liable for a total loss only where an abandonment has been made and actually or constructively accepted, or where there has been in fact an actual or technical total loss. The doctrine of some decisions, that he can be made thus liable by reason of even the "highest probability" of an actual or technical loss, without acceptance of an abandonment, *held* to be unsound.

2. Where an insurance has been effected in the name of one "for the benefit of whom it may concern," and he abandons, the other parties interested, even if he is to be considered prima facie their agent for that purpose, may, where they have not in fact concurred, disavow the agency within a reasonable time, either expressly or by their acts, and thus repudiate the abandonment. The taking possession and sale of a vessel, by a mortgagee whose interest was insured under such general words, after an abandonment by the mortgagor who was the nominal insurer, but before acceptance thereof, *held*, to be a dissent from the abandonment.

3. After an abandonment has been made, but not agreed to, the taking possession of and raising and repairing the vessel by the underwriter, accompanied, however by an express refusal to accept the abandonment, is no waiver of his right to treat it as a case of partial loss, if it prove to be so, provided there be not any assertion of title or act of ownership on his part. *Peel* vs. *Merchants' Ins. Co.*, 3 Mason, 27, dissented from. That the underwriter must in such case repair and tender the vessel in a reasonable time, is not, it would seem, necessary. *Reynolds* vs. *Ocean Ins. Co.*, 22 Pick. 171, so far disagreed to.

4. The American doctrine of a technical total loss doubted.

5. In determining whether a technical total loss has been incurred, upon a valued policy, the actual value of the vessel at the time of the disaster is to be taken, and not the valuation of the policy, and the proportion of loss is to be ascertained by deducting the cost of repairs from the value of the vessel when repaired.

6. Where a steamboat under a valued policy had been snagged and sunk in a river in Alabama, and the underwriters while refusing to accept an abandonment, had the boat raised, taken to Mobile, and there repaired, but the expenses of raising the boat had been greatly increased on account of misrepresentations by the master as to her condition at the time, it was *held* that the question of a technical total loss was to be determined by deducting what would have been the *reasonable cost* of raising the vessel, in addition to the costs of taking the vessel to Mobile and repairing her there, from the value of the vessel when the repairs were completed. Before leaving the vessel the master had dismantled her without necessity, *held* also that the cost of restoring the vessel to her former condition in this respect, was *not* to be included in the computation.

7. The court considering the case to have been one only of partial loss, and the boat having been sold by the mortgagee subsequently to the repairs, it was *held* that the underwriters were entitled to claim as against the insured, for the work done and materials furnished in and about raising, taking the boat to Mobile and there repairing her.

8. An account in this case was directed to be taken, as follows: 1. The underwriters to be allowed the reasonable (not the actual) cost of raising and taking the boat to Mobile, the reasonable cost of taking care of her till possession taken by the mortgagee, the reasonable cost of repairs, and any deductions required by the policy. 2. The underwriters to be charged with two-thirds of such cost of raising, taking to Mobile, and repairing.

9. The insured upon a partial loss is to be allowed the reasonable cost of taking the vessel to the place of repairing, though in the course of her voyage, where the nature of the disaster is such that she has ceased to earn freight or passage money.

10. A bill in equity may be maintained by one underwriter against the insured and the other underwriters, on the same vessel, for an account and an adjustment of the loss among the parties, in order to prevent a multiplicity of suits.

Bill in Chancery.

The facts of the case as they appeared upon the bill and answer, and from the evidence taken in the cause, were substantially as follows:

Prior to June, 1853, J. H. Goodman and J. A. Mooring were the owners of the steamboat Jenny Bealle. The former owned three-quarters parts, the latter one-quarter part.

On the 16th May, 1853, J. H. Goodman mortgaged his interest to D. W. Goodman to secure the payment of $10,500, in three notes of $3,500 each, dated 14th May, 1853, and due respectively January 10th, February 10th, and April 10th, 1854. In default of payment of either, all the notes were to become presently due. On 14th May, 1853, Mooring mortgaged his interest to D. W. Goodman to secure payment of $1,014, due ninety days after date. By the terms of the mortgages, possession of the boat was to remain with the mortgagors, and they were to receive the profits till default in payment; they were to keep the boat insured, and hold the proceeds for the benefit of the mortgagee.

On 20th June, 1853, insurance for a year for $5,000 was effected on the Jenny Bealle with the plaintiff. The policy was made to J. H. Goodman "for account of whom it may concern, loss, if any, payable to D. W. Goodman." By agreement in the policy, the boat was valued at $22,500; and the owners were prohibited from insuring more than two-thirds of her value, or $15,000.

On 21st June, 1853, insurance for $5,000 was effected with the Franklin Insurance Company, of Louisville, for one year, and upon same agreement as to value, and the amount of insurance that might be taken. This policy was made to "J. H. Goodman, for owners, or whom it may concern."

On 4th July, 1853, insurance for $5,000 was effected with the

Fulton Insurance Company, also for one year and upon the same agreement as to value, and the amount of insurance that might be taken. This policy was made to "J. H. Goodman, loss, if any payable to J. H. Goodman."

By the policies, insurance to $15,000, the extent allowed, was thus effected; leaving one-third at the risk of the owners.

On 13th April, 1854, while the Jenny Bealle was descending the Bigbee river, she struck a snag, which knocked a hole in her bottom, on the starboard side of the boat, abreast of the forward part of her boilers. She sunk directly; her forward part rested on the bottom of the river and remained out of water; her stern swung towards the bank of the river and grounded: the boat keeled or listed a little to the larboard side, so as to leave the whole of her starboard or right guard out of water: her larboard guard remained under water, some two or three feet, and the water covered the floor of her engine room, aft, about ten feet beyond the slash bulk-head, and to about the centre line of the boat: her stern was in about six feet water. At the time of the accident, the river was low, and falling, and the boat was coming down light.

The evidence of the men who raised the boat and of the men who repaired her, showed that one streak of plank was torn off her starboard knuckle. The hole thus made was between twenty and thirty feet long, and from eight to ten inches wide. Twelve to fifteen floor timbers and three or four plank were broken; some of her deck beams were also broken. The extent of the injury was differently stated by the witnesses. All, however, united in stating she could be raised, even had the water been deeper than it was, and that the boat was not a wreck.

When the Bealle sunk, the master, J. H. Goodman, stripped her of all her movables and furniture, and within thirty-six hours left for Mobile with all his crew except two men, who were left on the boat as watchmen.

On 21st April, Goodman reached Mobile, made his protest, and a verbal offer of abandonment to the underwriters. The abandonment was not accepted, and of this, Goodman was promptly informed.

Goodman, in his interview with the underwriters, represented the boat as a perfect wreck; that she had broken down in the centre; that her whole bottom forward was torn off, and it was impossible to save her.

The underwriters, acting on these representations, though hoping from the statements of the carpenter, that Goodman might be mistaken, on 22d April, contracted with Davis and others to raise the boat and bring her to Mobile, agreeing to pay $5,000 if the boat was delivered to them at Mobile, but nothing if she was not saved.

The boat was raised and reached Mobile on 18th or 19th May. The total outlay of money by the contractors, including their passage from Mobile and all expenses incident to the delivery of the boat at Mobile, was $455.

The labor of raising the boat did not exceed ten days; seven men were employed a part of that time, and a part, only five men. The above amount did not include any compensation to the contractors. The estimate of an experienced raiser of boats, was that the total expense should not have exceeded $1,000.

The state of the river was low and falling at the time of the accident, and the water actually fell at least six inches before Goodman left the boat.

All the witnesses stated that the river continued constantly to fall for two or three weeks or more, after the accident. The assured, it appeared, made no attempt to raise the boat, and did nothing towards saving her. No thorough examination was made of her condition, but the master left her as she lay in the river, and it was upon his incorrect representations of her condition, that the underwriters, as they alleged, were induced to incur a heavy and altogether unnecessary expense to have her raised. In addition to this conduct, they charged that the master increased the injury to the boat, by stripping and dismantling her, whereby, when saved from her peril, her value was materially lessened, and large additional cost created to restore her.

The evidence showed that ample opportunity existed to raise the boat—that the water fell some three or four feet, and that the boat was afloat some two weeks before there was an opportunity to

bring her down. This decrease of water it was asserted must have enabled persons to inspect the injury, and to adopt the simplest means of raising her. It was shown she was raised by actually building a bulkhead around the hole, as she lay. No expensive contrivances were resorted to, to weigh the boat, and raise her up, so as to enable workmen to get at the leak—for the leak was readily got at, as she lay in the river. Her position in the stream was favorable to being examined and repaired, for the injured side was elevated by resting on the logs.

The evidence showed that no examination or consideration was exercised by the master or owners of the boat, but that the determination to claim for a total loss was summarily arrived at, and then subsequently adhered to.

The evidence showed that the underwriters entered on the boat by its agents with the avowed object of repairing and restoring her to her owners—that they proceeded to carry out this object, inviting the co-operation of the owners—that they did repair the boat and tender her to her owners, who declined to receive her.

No abandonment or offer to abandon was proved on the part of D. W. Goodman, the mortgagee; but it appeared, that directly upon the repairs being completed, he entered upon possession of the boat under his mortgages, and exercised the power of sale thereby given him. He sold the boat, and was paid his mortgage debts. Since the sale the boat has been running the rivers as usual—is staunch and riverworthy, and insures as favorably as before the accident.

After the sale by D. W. Goodman, which realized $8,600, he assigned his interest in the policies to J. H. Goodman, who brought suit thereon against the underwriters for a total loss. These suits were pending in the Circuit Court of Mobile.

Under these circumstances, one of the underwriters, the Marine Dock and Mutual Insurance Company, filed its bill against all the parties in interest.

The bill set out plaintiff's contract of insurance—the interest of J. H. Goodman, J. A. Mooring and D. W. Goodman—the valuation of the boat—the representations of the master as to the nature of the injury—his conduct in causing her to be stripped—the con-

tract to raise the boat—the actual facts of injury done to her—the expense of repairs put on the boat—the other expenses attending the saving and repairing the boat.

It set out in general terms the other insurances effected on the boat, but expressed ignorance of the particular terms of each contract—and ignorance of the state of the mortgage debt due on the boat.

The plaintiff asserted that the loss suffered by the assured was partial only—claimed to have repaired the injury done the boat—that it had expended more than its share of the loss, and was entitled to be reimbursed out of the proceeds produced by sale of the boat, and to have a lien thereon prior to the lien of the mortgage—that it was entitled to contribution from the other underwriters—that the owners remained their own insurers to the extent of one-third, and that they should contribute in that proportion—that no right of abandonment existed, and no valid abandonment was made—and suggested what was conceived to be the proper adjustment of losses between the insured and insurers.

The plaintiff asserted that its policy of insurance had been discharged by the conduct of D. W. Goodman, who was the party interested, and had been paid his debt—leaving no interest on which the policy could operate: and prayed that an account might be taken of the debt due to D. W. Goodman on his mortgages—that an account might be taken and a proper adjustment of the losses and expenses might be made among the parties in interest, according to the terms of their policies and their respective interests in the boat: that Goodman's suits at law might be enjoined, and the appropriate relief administered.

Answers under oath were waived, except as to the items of discovery specifically sought.

D. W. Goodman answered, that he assented to the abandonment by J. H. Goodman, and believed it was valid—admitted mortgage from J. H. Goodman for $10,500; and from Mooring for $1,014 82—that Mooring had not paid anything on his debt—that J. H. Goodman had never made any specific payments, but had deposited money with him—and there was due from him $5,421 91.

Admitted that he took possession of the Jenny Bealle under his

mortgages after she had been repaired, and sold her for $8,600—that he made the sale without consulting J. H. Goodman, and to protect himself—after payment of his debt, that he has in hand $1,591 52—admitted that he had assigned his interest in the policy to J. H. Goodman, who had sued the plaintiff upon it.

J. H. Goodman answered, stating the interest of himself and Mooring in the boat at three-quarters and one-quarter—stated the accident occurred on 13th April, 1854—that forty to fifty timbers were broken—a large part of the floor was carried away, and that the boat broke or settled down aft or about the centre—six streaks of her bottom plank were broken and carried away—the hole made was ten to twelve feet long and five or six feet wide—that twelve or fourteen of her ribs were broken—she sunk in eight feet water, and it was impossible to raise her without a great and sudden fall of the river.

After consultation and examination the boat was stripped, and he came to Mobile, leaving two men to watch her.

He returned to the boat 25th April, and surrendered her to three men sent up by insurance companies, and since his notice of abandonment has considered the boat as belonging to underwriters—asserts that he used prudence and caution in the management of the boat.

He admitted the boat has been raised, but asserted it could not have been done, but for a sudden, great and unexpected fall of the river, not to be looked for at that season. Admitted repairs made, but asserted the boat has not been thoroughly repaired, and that the cost has been far greater than the amount stated in the bill—and that the boat required $2,000 to $3,000 more repairs to make her as good as before the accident—that the expense put upon the boat exceeded half her value, and if fully repaired, would be more than two-thirds of her value when repaired—that in case a boat, which has been running a year or two, is sunk, her character and reputation are greatly impaired and her value greatly depreciated, though she may have been raised.

Admitted mortgages to D. W. Goodman, and that respondent was bound to insure for his benefit—that D. W. Goodman assented to

the abandonment—that $5,421 91 is due on his mortgage to D. W. Goodman.

Admitted D. W. Goodman took possession of the boat and sold her under his mortgage—he did this without notice to respondent.

Stated that insurance companies purchased the boat for $8,600, which was more than her value, to deprive respondent of his right to insist on a total loss: and insisted that by his notice of abandonment, he acquired vested rights, of which the underwriters and D. W. Goodman cannot deprive him—insisted plaintiff had no lien for its repairs on the proceeds of the boat.

Respondent did not claim any interest in the money or boat, but as he was indebted to the mortgage, admitted his policies would be entitled to a credit for what has been paid D. W. Goodman of the policy to him, and that suits are pending.

James A. Mooring made answer the same in substance as J. H. Goodman—admitted his mortgage debt to D. W. Goodman to be unsatisfied and to amount to $1,014 82, with interest from 15th May, 1853.

The Fulton Insurance Company answered, and set out a copy of its policy made 4th July, 1853. Admitted injury to the boat, but denied any liability because only two-thirds in value of the boat should be insured.

The policy was to J. H. Goodman for his own account, loss payable to him, and was subsequent to the other insurances. J. H. Goodman owned three-quarters of the boat, and before the date of the policy, had morgaged his interest to D. W. Goodman for $10,500, which mortgage was unpaid and forfeited, and J. H. Goodman had only an equity of redemption.

Defendant, by terms of its policy, was to be liable only for the deficiency after other policies are exhausted—and the other policies more than cover the interest of said Goodman: that defendant is not liable because said Goodman failed to remain on the boat with his officers and crew, till the decision of the underwriters was known—he neglected to labor and travel to save the boat, but wantonly stripped and injured her.

Defendant was not liable, because the expense of repairs proper,

deducted one-third new for old, and computing according to the agreed value of the boat does not amount to 7 per cent. on the value of the boat.

The agreed value was $22,500—but that was asserted to be a gross over-valuation by J. H. Goodman, and that she was not worth more than $15,000.

The injury was small, the river was low, and Goodman should have raised her, and brought her to Mobile, but he greatly misrepresented the injury, and thus induced defendant, with the other underwriters, to make an extravagant contract to raise the vessel. This has been done, and was done in order to repair and return her to her owners. The true salvage service, was worth not more than $1,000, whereas said Goodman, by his conduct, induced an expense of $5,000—of which the underwriters should not bear more than $1,000.

The boat was well and promptly repaired and tendered to her owners, who should have accepted her, but who refused so to do.

That D. W. Goodman was entitled to the possession of the boat under his forfeited mortgage—that he acquired this right by the mortgage of J. H. Goodman—that D. W. Goodman entered upon and sold the boat and has delivered possession of her.

The sale of the boat was injured by the dismantling done by order of J. H. Goodman.

Admitted plaintiff should be paid for its repairs beyond the amount due on its policy, but denies defendant is liable to pay anything —that J. H. Goodman has brought suit, but denies he should recover anything, because more has been paid than was due, and if any loss is chargeable to insurance companies it is only for their proportion of repairs proper, if they exceed the reserved per centage, and a proper proportion of the true value of salvage, which does not exceed $1,000.

Defendant claimed to be reimbursed from sale its advances for salvage, because these advances were made without knowledge— did not claim this as against the other insurers:

Submitted to the judgment of the court, and insisted the value of repairs and proper value of salvage service should be charged on

the whole value of the vessel—one-third charged to owners, as not covered by insurance. Of balance to defendant, only such part of one-third as was equivalent to the interest of J. H. Goodman at the time of loss:—that D. W. Goodman should be charged with the proportionate part of the loss which falls to so much of his mortgage as was due and unpaid, as the same was not covered by defendant's policy:—that the proper amounts be charged to the prior insurers.

The Franklin Insurance Company submitted its case to the court, with a copy of its policy, and relied on a proper adjustment being made thereunder.

P. Hamilton, for the complainant.
——— ———, for the defendants.

KEYES, Ch.—The first question that I propose to examine in this cause, is whether the complainant is liable for a total loss?

It may be deduced from some of the authorities that there are four cases in which the assured may abandon the thing insured to the underwriter, and hold him responsible for a total loss.

1. When there has been an actual total loss.
2. When there has been a technical total loss.
3. When there is the highest degree of probability that a loss amounts to an actual total loss.
4. When there is the highest degree of probability that a loss amounts to a technical total one.

I think that some of the authorities have pushed the doctrine beyond its true extent, and that the misapprehension has crept in by not attending to the distinction between those cases in which an abandonment fixes the responsibility of the underwriter, whether he accept or not, and those cases in which he is not liable for a total loss unless he accept the abandonment. When a loss, whether it be partial or total, occurs, and the assured abandons and the underwriter accepts the abandonment, the agreement is binding and cannot be avoided except for some reason that would avoid any other agreement. But when an abandonment is made and the acceptance of it declined, the underwriter cannot be held liable for a total loss,

unless it be proved that an actual total loss or that a technical loss has occurred. It matters not what the assured knew nor what his means of information were, for *the real state of the loss* at the time of the notice of abandonment is the proper and safe criterion of the rights of the parties. *Marshall* vs. *Delaware Ins. Co.* 4 Cranch, 202; *Rhinelander* vs. *Ins. Co. of Pennsylvania*, Id. 29. Subsequent events may be used as evidence to show what the state of facts was at that time, but for no other purpose.

When a probability of total loss exists, both parties may take the chances. It would be but prudence on the part of the assured to abandon and give notice whenever he is satisfied that the loss amounts to a technical total one, since he cannot otherwise fix such a loss upon the underwriter, and it would be but prudence on the part of the underwriter to decline an acceptance of the abandonment, unless he should be satisfied that the loss exists, since otherwise he would be bound for a total loss, when perhaps but a partial one had occurred.

Probability then, seems to have nothing to do with the matter, except as a result of evidence upon which the parties may act, and upon which a jury or court may decide the controversy. Discarding, therefore, the cases of abandonment based upon probability, I assert the doctrine to be, that an underwriter cannot be made liable for a total loss in any other than in one of these three cases:

1. Where an injury less than a technical total loss has occurred, and the assured has abandoned, and the underwriter has expressly or constructively accepted the abandonment.

2. Where there has been an actual total loss.

3. Where there has been a technical total loss.

The doctrine asserted is approved by the contract itself, for it is a contract of indemnity, a contract to answer for loss, not for the probability of it.

It is admitted by the complainant that a partial loss has occurred.

An abandonment must be made by every party interested; but it is said that when several persons are interested in a vessel and some of them cause a policy to be effected on the behalf of himself and the others, that he who caused it to be effected is to be considered as

the agent of the others, and therefore competent to give notice of abandonment. Hughes on Insurance, 431. In such case, however, the party giving notice must assume to act as the agent of the others, and that does not appear to have been done in this case so far as the mortgagee is concerned. Admitting, nevertheless, that John H. Goodman, who gave the notice, did assume to act as agent of the mortgagee, and that the mortgagee had the right to avail himself of it, yet it is clear that he had also the right to disavow the agency within a reasonable time, and to assert his rights under the mortgages. If the mortgagee had done nothing by which the agency of John H. Goodman was ratified, I think that the taking possession of the boat and selling it was a disavowal of the agency of John H. Goodman, and that the disavowal was made in a reasonable time. If, however, the abandonment was once perfected by the mortgagee, then he could not in any way affect the claim of the mortgagors for a total loss. The only effects that the action of the mortgagee could have in that case for or against the mortgagors, would be to substitute the underwriters to the place of the mortgagee, *quoad* the amount to which the mortgage became thereby entitled to a credit, and to deprive the mortgagee of any further claim by way of lien.

It may be admitted that the mortgagee was willing that the insurance companies should pay him the amount due on his mortgages, but I cannot find the testimony which shows that he ever relinquished his claim to the boat.

But the testimony shows that the underwriters did not accept the offer to abandon, unless it be that taking possession of the boat and repairing it amounts to an acceptance, though done under an express refusal to accept the abandonment. I cannot persuade myself to follow *Peel et al.* vs. *The Merchants' Ins. Co.*, 3 Mason, 27, though the learned judge who delivered the opinion in that case argues at some length to show "what would be the mischiefs and embarrassments attending this novel doctrine." The "novel doctrine" is, that an underwriter may upon an abandonment for a technical total loss refuse to accept it, and may nevertheless take possession of the vessel, and demonstrate, by repairing, whether the loss be in fact a technical total one.

Consider for a moment the consequences of denying this doctrine. The assured cannot do anything with the vessel without waiving his claim for a total loss, nor can the underwriter do anything with it without making himself liable for a total loss, though in fact it be but a partial one. The vessel must remain without an owner until the contest shall have been decided, and as Judge Story feared would be the case in 3 Mason, the property "may perish in the contest."

Look now at the consequences of admitting the other doctrine. The underwriter repairs the vessel, and if the cost of repairs show that there was a technical total loss, he is bound for it, notwithstanding his refusal to accept the offer of abandonment; if on the other hand it be shown by the cost of repairs that a technical total loss had not occurred, the assured gets all that he could have gotten had the vessel been left to perish in the contest, provided the truth could have been shown. He could not have recovered more than two-thirds of the cost of repairing, and that is what he gets by keeping the vessel when it is repaired, or by selling it then if he prefers the money.

The tendency of the doctrine, then, strongly commends it, for it subserves one great end of law, viz., the preservation of property; it relieves the administration of the law from the uncertainty of the testimony, and it saves to all parties their just rights.

The case is one *sui generis*. When the assured abandons and gives notice to the underwriter, and he refuses to accept, the thing insured is a thing without an owner as between the parties. The underwriter may, therefore, take possession of it as he would of any thing else that is abandoned by its owner. But he cannot do any thing that amounts to an assertion of title, for that would be an acceptance of the abandonment. He cannot, therefore, sell it, or destroy it, or use it for profit. He cannot retain it from the assured when demanded, for that also would be an assertion of title, and therefore an acceptance of the abandonment. He may, however, like the finder of a chattel, do anything for the advantage of the owner not inconsistent with his title. Thus, if a watch-maker were to find a broken watch, he might repair it without making himself liable in trover.

It cannot be said that the underwriter in such case takes possession, or repairs against the will of the assured, for as already said, the assured cannot have any will about it whilst he perseveres in his abandonment.

It is common learning that a man's acts may be explained by his declarations, whenever the acts and declarations are not inconsistent. The possession of an underwriter upon an abandonment is not inconsistent with his refusal to accept the abandonment, since it may be attributed to his right to take any chattel personal that is abandoned by its owner. His possession cannot, therefore, be taken as "decisive evidence of an acceptance," under the policy of insurance.

I think it is quite clear that there is a difference between the case of an abandonment and a case of partial injury without abandonment, and that it is not true that, "if the underwriter has a right to repair in one case, he has in all cases." It is asked in *Peel et al.* vs. *The Merchants' Ins. Co.*, the case before cited, "At whose risk would the ship be during the repairs?" I reply, at the risk of him to whom it should be determined by the suit that the vessel belonged. It is further asked, "Could the owner sell her so as to oust the right of the underwriter to repair, or must he sell her *cum onere?*" I reply, that a sale by the assured would be a waiver of his claim for a total loss. It is further said, "suppose an attachment on the property," and to that supposition I say that a court of equity would enjoin.

My conclusion then, is, that the underwriter in this case did not accept the abandonment by taking possession of the boat and repairing it, and this conclusion is in accordance with *Peele* vs. *Suffolk Ins. Co.*, 7 Pick. 254, and with the opinion in *Commonwealth Ins. Co.* vs. *Chase*, 20 Pick. 142; in *Reynolds* vs. *The Ocean Ins. Co.*, 22 Pick. 191; 1 Metcalf, 160; *Griswold* vs. *The New York Ins. Co.*, 1 Johns. 205, which are cited 2 Am. L. C. 217–220. And I may add here that the qualification of the doctrine asserted in *Reynolds* vs. *The Ocean Ins. Co.*, that the underwriter must repair and tender the vessel within a reasonable time, seems to be unwarranted by the principle upon which the underwriter takes possession and repairs. It is admitted that the loss in the case is

not an actual total one, and the inquiry alone that remains on this branch of the cause is, whether the loss amounts to a technical total loss?

If I were left free to determine what damage to a vessel amounts to a technical total loss I should follow the English cases, and reject what has been called "the more sensible French rule" and which has been adopted by some of the American courts. The policy, however, issued by the complainant, precludes all question on that point by declaring that the damage must be fifty *per centum* on the interest of the assured, in order to entitle the assured to claim for a total loss.

Courts in this country differ in regard to the rule by which the value of the vessel should be estimated in ascertaining whether an injury to a vessel amounts to a technical total loss. The rule which takes the actual value at the time of the disaster is the one which seems to me to give the correct result, though the rule is theoretically incorrect. The value of the policy is binding upon the parties when the assured sues for a total loss, and there is no just reason why it should not be used in the one case as well as in the other, as well for the underwriter as against him. It is indeed a violation of the contract to subtract the actual loss from the value of the policy, for the value of that portion of the vessel which is destroyed is as much fixed by the policy as is the whole value of the property. Men differ about value. Loss is merely relative, and cannot be determined without fixing value. The assured and the underwriter have the right to fix it, and when they do so their agreement is binding upon both, whenever the amount of value comes in question between them, unless the agreement can be avoided upon some ground known to the law of contracts. If, therefore, they fix the value of the vessel at $20,000 and the damage amounts to 50 per cent., the damage must be computed between them at $10,000. If witnesses say that the actual value of the vessel was $10,000 and that the damage is $5,000, they say precisely what is said in the other case, viz: that the vessel is damaged 50 per cent. The only legitimate object of testimony on the question, is, therefore to ascertain the proportion of loss and the difference between the witnesses and the parties as to

the value of the vessel, and as to the sum which the loss should be counted, is quite immaterial.

Courts in this country differ also upon the question whether one-third new for old should be deducted from the value of the vessel before the cost of repairs is subtracted from the value, for the purpose of ascertaining whether there is a technical total loss or not?

If the value of a vessel is increased by repairs, it is clear that the increase should be deducted from the value when required, in order to get the value at the time of the disaster. If, however, the vessel be not repaired, and the cost of repairing is to furnish the diminuent, and the value of the vessel at the time of the disaster the subtrahend, it is clear that one-third of the cost of repairing should be taken off before the subtraction of it from the value of the vessel, if it be true that repairs would be worth one-third more than the old work.

But the question is not, whether the vessel after being repaired is a better one for use, but what proportion of its value has been destroyed. It is true that the underwriter does not insure the reputation of a vessel, but still if the accident impairs the value of it when repaired, that depreciation rightly enters into the valuation of the vessel whenever the value at the time of the disaster is attempted to be educed from the value after it is repaired.

I am satisfied that it is as true that the market value of a vessel is injured to the extent of one-third the cost of the repairs as it is that the new work is worth one-third more than the old. Instead, therefore, of embarrassing each case with the adjustment of such loss and gain, I think it is better to exclude them both, and to hold that the question of technical total loss shall be determined by deducting the cost of repairing from the value of the vessel when repaired. That rule, I have said, gives the correct result, though the rule itself is theoretically incorrect. The rule theoretically is this: Take the cost of repairing for a numerator, and the value of the vessel when repaired at the place of repairs, for a denominator, and the fraction thus made will be the proportion of the loss to the value. The items which rightly enter into the numerator in this case, are: The reasonable cost of raising the boat, taking it to Mobile, and of

repairing the damage resulting from the snagging, sinking, and raising of it. The denominator is the value of the boat *not dismantled*, and with the repairs of the damage done by snagging, sinking and raising, completed.

The underwriters paid $5,000 for the raising and delivery of the boat at Mobile. The testimony shows that the amount is much larger than the reasonable cost of doing it. I cannot say precisely the amount of the reasonable cost, but I think it is quite certain that it does not exceed $800 or $1,000. The cost of repairs, which were made before the sale of the boat by the mortgagee, does not amount to $2,000. The boat was sold with part of her furniture aboard and the damage done by dismantling unrepaired, for $8,600 at the sale under the mortgages.

That statement of the matter makes the loss but a partial one. It is said, however, that the repairs made before the mortgagee's sale did not cover the injuries which the boat had received. I cannot undertake to say what the cost of the additional repairs would have been, but I am strongly inclined to the opinion that it could not have been sufficient to have made the cost of raising and repairing amount even to half the price for which the boat was sold at the mortgage sale. Had the additional repairs been made, or had the boat not been dismantled, it would doubtless have sold for a larger price. That such would have been the effect, may be inferred not only from the fact that the value of the boat would have been enhanced, but also from the fact that subsequently, less than $4,000 was expended in painting, refurnishing and making some other repairs, and the boat was then resold for $15,000.

I have excluded from the cost of repairing, the injury that was done by dismantling the boat, because it did not result from the accident, nor was it necessary for the raising of the boat, nor for the preservation of it, or of the things removed. There was no probability of injury to the things removed, or of their loss, unless the river should rise several feet. The river was falling, and there were no indications of rain when the dismantling was begun, and even if there had been, it would have been quite soon enough to have commenced when it became apparent that a considerable rise might be expected.

It is said in the defence, that the boat was bid off by the underwriters at a price beyond its value, for the purpose of turning the loss into a partial one, but the testimony shows that the price was about the value of the boat as it then was.

Notwithstanding I am persuaded by the testimony before me, that the case is not one of technical total loss, yet as there must be a reference to the master, I will direct him to ascertain amounts more precisely than I can now obtain them, and I will reserve the point until the hearing upon his report.

Assuming, then, that the loss is a partial one, it becomes necessary to examine what are the rights of the parties upon that basis. The underwriters having raised the boat, conveyed it to Mobile, and caused repairs to be made, it is necessary to inquire whether they have any claim on that account against the assured?

There can be no doubt on that point in this case, if it be one of partial loss, for the mortgagee took possession of the boat after the repairs were made, and sold it under his mortgages. But independently of that fact, I think that an underwriter has a claim for work done and materials used in and about raising, taking to the port of necessity, and repairing the vessel. It is true, as Mr. Phillips says, the precedents cited in the *Commonwealth Ins. Co.* vs. *Chase*, 20 Pick. 142, do not sustain the claim. It seems to me, nevertheless, that the claim is sustained by principle. In case of marine loss the claim for raising the vessel might be sustained as salvage, but that ground is not broad enough to sustain a claim for general repairs. It is better, therefore, to place the whole claim upon another ground, which is as broad as it is satisfactory. "If one accepts or knowingly avails himself of the benefit of services done for him without his authority or request, he shall be held to pay a reasonable compensation for them." *Abbot* vs. *Hermon*, 7 Greenl. 118; *Weston* vs. *Davis*, 24 Maine, 374. The assured who abandons his vessel and then asserts title to it after it has been recovered and repaired by the underwriter, knowingly avails himself of the services of the underwriter, and he must therefore be held chargeable for them.

The next question is in regard to the items which enter into the underwriter's claim in this case. They are: 1st. The reasonable

cost of raising the boat. 2d. The reasonable cost of taking it to Mobile. 3d. The reasonable cost of taking care of it after it was raised until it was started to Mobile, and for such other time prior to the taking possession by Duke W. Goodman, the mortgagee, as it was under the care of the repairers, and was taken care of at the cost of the underwriters. 4th. The reasonable cost of the repairs made by the underwriters before the sale by the mortgagee. 5th. The deductions, if any, required by the policies.

The other side of the account must be made by charging the underwriters with two-thirds of the reasonable cost of raising the boat, taking it to Mobile, and of repairing the damage done by the snagging, sinking, and raising of the boat. The master will not confine himself to the repairs made, but to such as should have been made to repair the damage done in the several ways mentioned.

The authorities do not seem to allow the expense of taking the vessel to the place of repairs, unless it be out of the course of the vessel, to be charged against the underwriter, but that seems to me most unreasonable, whenever the vessel by reason of the accident is unable to earn freight or passage money.

I do not know that I need add any further instruction to the master for stating the accounts, except the general ones, to take the policies as a guide on such points as their terms cover, and to make such reasonable allowances herein omitted as may be suggested by the parties.

He must also ascertain what the value of the boat would have been at the mortgage sale, had the repairs from snagging, sinking and raising, been complete, and the boat had not been dismantled. It will be seen that I have not allowed the underwriter to claim anything by reason of the bad bargain made in relation to the raising and delivery of the boat, but there was no obligation upon them to raise or repair, and I do not know any ground on which the claim can rest. It is true that the bargain was made upon the statement of facts given by Captain Goodman, and that the statement was incorrect, but that is immaterial, and besides, I am satisfied that he was honestly, though hastily, mistaken.

It is said that the bill is without equity, but I have no doubt on

that point. It seems to me, that the bill is sustained by the doctrine of avoiding multiplicity of suits, if no other ground could be discovered.

I decline to enjoin the suits at law at this time. If they, or either of them, should be tried before the hearing on the report, a certified copy of the judgment may be filed, and the parties in this cause may take such supplemental steps as they shall be advised in that respect.

There is an agreement between the underwriters which renders it unnecessary to go into the equities which exist between them.

I do not think it is necessary to decide the other points made in argument, and my labors press me too closely to allow me to examine and discuss them at this time.

Let the following order be entered:

This cause is submitted on bill, answers and testimony, for a decree in vacation, and upon consideration, it is ordered that it be referred to the registrar, as master, to ascertain the amounts and to state the account according to the opinion, and that in doing so, he will look to the evidence on file, and to such other evidence as may be offered by the parties.

It is further ordered that the master report at the next term, and that he accompany his report with a note of the oral testimony adduced before him, and also with such other evidence not on file, as may be obtained in his investigation.

And it is further ordered, that Duke W. Goodman be enjoined from paying to John H. Goodman, or to Mooring, any part of the proceeds of the sale of the boat.